tion perforce, a privilege denied to residents.[15] It is true that one extradited from a foreign country is privileged at least from arrest on civil process.[16] But this is because of the express provisions of treaties; whereas interstate rendition is a matter not of comity but of constitutional right. So, too, the privilege extends to one brought into the jurisdiction on charges trumped up for the purpose.[17] But that is only one instance under the broader independent rule that all persons, whether concerned in judicial proceedings or not, who are brought into the jurisdiction improperly, as by fraud or force, are privileged.[18] Some courts, however, privilege all non-resident defendants in criminal actions.[19] Thus privilege from arrest was given in *Weale* v. *Clinton Circuit Judge*, 123 N. W. 31 (Mich.). But on the other hand, privilege even from summons was denied in *Netrograph Mfg. Co.* v. *Scrugham*, 197 N. Y. 377. In the latter case the fact that the prisoner's return on bail was in a sense voluntary affords ground for an arguable distinction;[20] yet as he was always potentially in the power of the court, privilege was properly denied him.[21]

In short, any one not subject to interstate rendition, coming voluntarily from without the jurisdiction to participate therein in any form of judicial proceeding, either civil or criminal, should be privileged from service of all civil process while remaining in the jurisdiction[22] for the original purpose.[23]

RISK OF LOSS AFTER AN EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE. — If, after an executory contract for the sale of real estate, the property is destroyed by fire,[1] upon whom should the loss fall? Where the calamity is occasioned by the fault of either of the contracting parties, or where the contract expressly provides for risk of loss,[2] the answer is simple; but further than this neither the courts nor students of the law[3] are agreed. As failure of consideration is ground for rescinding a contract, the destruction of any considerable part of the *res* before performance ends all

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[15] Goodwin *v.* Lordon, 1 A. & E. 378; Hare *v.* Hyde, 16 Q. B. N. S. 394; Scott *v.* Curtis, 27 Vt. 762.

[16] *In re* Reinitz, 39 Fed. 204.

[17] Byler *v.* Jones, 79 Mo. 261.

[18] Williams *v.* Reed, 29 N. J. L. 385.

[19] Moletor *v.* Sinnen, 76 Wis. 308; Jacobson *v.* Hosmer, 76 Mich. 234; State *ex rel.* Hattabaugh *v.* Boynton, 121 N. W. 887 (Wis.).

[20] Gilpin *v.* Cohen, L. R. 4 Ex. 131.

[21] Reid *v.* Ham, 54 Minn. 305. *Contra*, Kaufman *v.* Garney, 173 Fed. 550; Martin *v.* Bacon, 76 Ark. 158.

[22] The privilege should not extend to causes of action arising therein. See Nichols *v.* Horton, 14 Fed. 327, 330.

[23] The privilege may be set up by a plea in abatement, or preferably by a motion on special appearance. See Thornton *v.* American Writing Machine Co., 83 Ga. 288.

[1] For losses from other causes, involving the same question, see 15 HARV. L. REV. 733 (eminent domain); Poole *v.* Shergold, 2 Bro. C. C. 118 (blowing down of timber); Kenney *v.* Wexham, 6 Madd. 355 (death of *cestui que vie* in sale of annuity).

[2] See Marks *v.* Tichenor, 85 Ky. 536. The courts examine the contract closely for any indication of the parties' intention as to risk of loss. See Allyn *v.* Allyn, 154 Mass. 570.

[3] See 1 HARV. L. REV. 373 *et seq.*; 9 HARV. L. REV. 106; 1 COLUMBIA L. REV. 1.

liabilities[4] under a contract contemplating the continued existence of that *res*.[5] And several decisions[6] go on the theory that the parties must, from the nature of the contract, have contemplated that the property when conveyed be in substantially its original condition; so that, if the vendor cannot convey such property, he has no recourse against the purchaser in case of loss.

A second view, regarding, not the legal title, but the *jus fruendi* of the original premises as the substantial thing bargained for, arrives at the conclusion that the party in possession should be the loser.[7] And the party in possession is usually the vendor. That the vendor has, in the absence of express circumstances, the right of possession[8] and profits[9] up to the date of conveyance is undeniable; but the explanation is, that since he is not entitled to interest on the purchase price from the date of the agreement,[10] it would be unfair to deprive him, even temporarily, of the beneficial use of both the money and the land.[11]

As equity, however, will give specific performance of a contract[12] for the sale of land, the purchaser, though not entitled to possession immediately upon the making of the contract, does acquire certain proprietary rights. The relation created is, in many respects, similar to that of a mortgage or trust.[13] For, while the vendor is not held to all the active duties of a trustee,[14] he is at least bound to take some care of the land for the purchaser,[15] who also profits by all fortuitous improvements.[16] The purchaser has, moreover, every lawful right to dispose[17] of the property; and his assignee or appointee, upon fulfilling the purchaser's part of the contract, is entitled to the land as against all but a *bonâ fide* purchaser.[18] If either of the contracting parties dies before completion, all rights to the property and to the purchase money rest on the assumption that the land was in effect held in

[4] It is optional with a purchaser, of course, to accept the damaged property. Hallett *v.* Parker, 68 N. H. 598.

[5] Howell *v.* Coupland, 1 Q. B. D. 258.

[6] See Wells *v.* Calnan, 107 Mass. 514; Hawkes *v.* Kehoe, 193 Mass. 419; Gould *v.* Murch, 70 Me. 288.

[7] This view has received little support in the language, at least, of the courts. See AMES' CASES ON EQUITY, 236, note 1.

[8] Robertson *v.* Skelton, 12 Beav. 260; Burnett *v.* Caldwell, 9 Wall. (U. S.) 290.

[9] Lumsden *v.* Fraser, 12 Simons 263. *Contra*, Wimbish *v.* The Montgomery Mutual Building & Loan Ass., 69 Ala. 575.

[10] Minard *v.* Beans, 64 Pa. St. 411.

[11] See Fludyer *v.* Cocker, 12 Ves. 25; Siemers *v.* Hunt, 28 Tex. Civ. App. 44.

[12] Unless the contract is one which equity will enforce, the loss must fall on the seller. Blew *v.* McClelland, 29 Mo. 304 (contract not complying with Statute of Frauds).

[13] This relation is clearly recognized even in Massachusetts. See Felch *v.* Hooper, 119 Mass. 52.

[14] He is not bound, for example, to insure for the benefit of the purchaser. See Rayner *v.* Preston, 18 Ch. D. 1; Ins. Co. *v.* Updegraff, 21 Pa. St. 513.

[15] Clarke *v.* Ramuz, L. R. [1891] 2 Q. B. 456 (waste); Earl of Egmont *v.* Smith, 6 Ch. D. 469 (failure to keep land cultivated and tenanted); Holmberg *v.* Johnson, 45 Kan. 197. *Contra*, Hellreigel *v.* Manning, 97 N. Y. 56.

[16] See Paine *v.* Meller, 6 Ves. 349; Woodward *v.* McCollum, 111 N. W. (N. D.) 623.

[17] He has the right to sell, mortgage, or devise the land. See Shaw *v.* Foster, L. R. 5 H. L. 321, 338. The vendor cannot even subject it to a servitude. Hallett *v.* Parker, *supra*. And the property is no longer liable for the vendor's debts. Blackmer *v.* Phillips, 67 N. C. 340.

[18] See Taylor *v.* Kelly, 3 Jones, Eq. (N. C.) 240. In this country the purchaser can, by recording the contract of sale, prevail over any possible claimant.

trust for the vendee.[19] Similarly, in insurance the purchaser,[20] and not the vendor,[21] is regarded as the sole, unconditional owner under a condition providing that the policy shall be void unless the assured has such an interest. In view, therefore, of this equitable ownership arising from the mere contract relation, the fairest rule — that adopted in England [22] and in the majority of jurisdictions in this country [23] — lays the risk of loss from the moment of the contract upon the purchaser.

As each of these three rules seems to find some support in the New York cases,[24] it is noteworthy that the latest decision in that jurisdiction, though on its facts sustainable on the test of possession, expressly adopts the prevailing rule. *Sewell* v. *Underhill*, 197 N. Y. 168 (Ct., App.).

RECENT CASES.

AGENCY — AGENT'S LIABILITY TO THIRD PERSONS — WARRANTY OF AUTHORITY BY AGENT. — The defendant employed solicitors to defend him in an action for libel, and requested the plaintiff to address further communications to them. He was thereafter adjudged insane. In ignorance of this fact, the solicitors continued to act as the defendant's attorneys, until the plaintiff, learning the circumstances, moved that the action be struck out and that the solicitors pay the costs. *Held*, that the motion be granted. *Yonge* v. *Toynbee*, 26 T. L. R. 211 (Eng., Ct. App., Dec. 21, 1909).

The leading case on the question raised by the principal case merely held that an agent impliedly warrants that he has not exceeded his authority. *Collen* v. *Wright*, 7 E. & B. 301. But this doctrine has been applied to the case of an agent professing to have authority to make a contract which his principal would have been unable to make. *Richardson* v. *Williamson*, L. R. 6 Q. B. 276. It has also been extended so that persons who in fact have no authority whatever, are held to warrant that they have such authority as they profess. *Starkey* v. *Bank of England*, [1903] A. C. 114. Inconsistently with this development of the doctrine, it had previously been held that a person who had been an agent does not warrant that his authority has not been terminated by operation of law, as by the death or insanity of his principal. *Smout* v. *Ilbery*, 10 M. & W. 1; *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43. Although in these cases the facts on which the agent's

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[19] Thus if a statute gives dower in equitable estates, the widow of the vendee has dower. Thompson *v.* Thompson, 1 Jones (N. C.) 430. Conversely, the widow of the vendor has none. Dean's Heirs *v.* Mitchell's Heirs, 4 J. J. Marshall (Ky.) 451. The vendee's heir, rather than his personal representative, is entitled to a conveyance. Milner *v.* Mills, Moseley 123. The purchase money goes to the vendor's personal representative, not his heir. Green *v.* Smith, 1 Atkyns 572. The legal title passes under a devise by the vendor of his "trust estates." Lysaght *v.* Edwards, 2 Ch. D. 499.

[20] Pelton *v.* The Westchester Fire Ins. Co., 77 N. Y. 605; Dupreau *v.* Hibernia Ins. Co., 76 Mich. 615.

[21] Hamilton *v.* The Dwelling House Ins. Co., 98 Mich. 535.

[22] See Paine *v.* Meller, *supra;* Poole *v.* Adams, 33 L. J. Ch. N. S. 639. An early *dictum* was *contra.* See Stent *v.* Bailis, 2 P. Wms. 217. *Cf.* Bacon *v.* Simpson, 3 M. & W. 78; Taylor *v.* Caldwell, 3 B. & S. 826.

[23] See Marks *v.* Tichenor, *supra;* Marion *v.* Wolcott, 68 N. J. Eq. 20; Woodward *v.* McCollum, *supra.*

[24] See Gates *v.* Smith, 4 Edw. Ch. 702; McKechnie *v.* Sterling, 48 Barb. 330; Clinton *v.* Hope Ins. Co., 45 N. Y. 454; Wicks *v.* Bowman, 5 Daly 225; Pelton *v.* Westchester Fire Ins. Co., *supra;* Smyth *v.* Sturges, 108 N. Y. 495; Goldman *v.* Rosenberg, 116 N. Y. 78; Listman *v.* Hickey, 65 Hun 8.